OCT 10 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-414

JOHN DE VESTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Petitioner, JOHN DE VESTE, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 11, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears in the

Appendix hereto. The judgment of the conviction entered by the United States District Court for the District of Nevada, following a trial by jury, appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 11, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court erred in failing to instruct on the basis of the lesser included offense requested by the Petitioner.

2. Whether the Trial Court erred in failing to dismiss Count XXI of the indictment charging embezzlement in violation of 18 U.S.C. §641, since a specific statute, 18 U.S.C. §500, with lesser penalty, was enacted to preclude the general statute with greater penalty under which the Petitioner was prosecuted.

STATUTES INVOLVED

Title 18 U.S.C., Sections 500, 641 and 1713. The text of these Statutes appear in the Appendix hereto.

STATEMENT OF THE CASE

The Petitioner, JOHN DE VESTE, was indicted by a Federal Grand Jury in Las Vegas, Nevada, on August 16, 1973.

The Petitioner, JOHN DE VESTE, was tried before the Honorable Roger D. Foley, with a jury, from November 5, 1973, through November 7, 1973, on four counts of the indictment charging him with issuing money orders without having previously received or paid full amount of money payable therefor with the purpose of fraudulently obtaining from the United States or the Postal Service sums of money thereon, Counts I, XV and XX (18 U.S.C. §500); and embezzlement of public monies, Count XXI (18 U.S.C. §641).

The basic facts of the case as related by the Government witnesses were not controverted to any great extent during the course of the trial. The Government's contention was that Mr. DE VESTE issued postal money orders without having received or paid the full amount of money payable therefor in his position as a contractor at a contract station of the United States Postal Service in Las Vegas, Nevada. The Government contended that Mr. DE VESTE, the Petitioner, engaged in this activity for the purpose of fraudulently obtaining and receiving the sums of money from said postal money orders. The Petitioner did not contest the fact that he had in fact issued these postal money orders without having previously received and paid the full amount of monies payable therefor. The only point of factual contention was whether or not

the Petitioner issued these money orders with a fraudulent intent.

The Government presented evidence that the Petitioner had entered a bid for a contract station of the United States Postal Service at the Petitioner's business establishment and that such bid had been forwarded to appropriate channels and approved by the United States Postal Service. The Government introduced into evidence the oath of office signed by Petitioner which was executed upon Petitioner's becoming a contract station operator. Evidence was also introduced by the Government that Petitioner's contract station was issued 500 postal money orders as well as other supplies needed to run a postal contract station. Further evidence was presented by the Government that these postal money orders were in fact issued but that payment for most of these postal money orders was in fact not received.

The Government introduced further evidence which it contended proved that the issuance of these postal money orders by Petitioner was done with the requisite intent to defraud the United States. The Petitioner testified that he believed the postal contract station would have a semi-annual audit of its funds and that at the time of the audit any monies he owed to the Postal Service would become due. The Petitioner readily admitted issuing these postal money orders; he testified that quite a few of these money orders were made payable by him to the Internal Revenue Service in satisfaction of a tax debt that he had incurred. Further, Petitioner readily admitted that these postal money orders were made out to business associates of Petitioner's for supplies and services rendered, and that

he had paid a down-payment on an automobile with the same. The Petitioner's testimony indicated that he believed that by personally using these money orders to pay his own existing debts (rather than issuing the money orders to third party customers) he was in fact not doing anything wrong. He believed that he would pay the Postal Service monies that he owed to the Postal Service at the time of the semi-annual audit.

The trial judge in instructing the jury refused to instruct on a lesser included offense and on a form of general verdict as to lesser included offense, both of which were requested by Petitioner. The trial judge ruled that 18 U.S.C. §1713 was not a lesser included offense to 18 U.S.C. §500 in this case.

The jury found Petitioner DE VESTE guilty on all charges and the Court entered judgment and imposed the sentence following denial of the Petitioner's motion for a new trial, or, in the alternative, for judgment of acquittal. Petitioner DE VESTE was allowed to sign his own recognizance bail pending appeal.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction, not reaching the second question presented for review based on the concurrent sentence rule. On October 3, 1974, the Court of Appeals stayed the issuance of the mandate and Petitioner remains at liberty on his appeal bond.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON THE BASIS OF THE LESSER INCLUDED OFFENSE REQUESTED BY PETITIONER.

Petitioner contends that 18 U.S.C. §1713 is a lesser included offense to Counts I, XV and XX of the instant indictment. The text of 18 U.S.C. Sections 500 and 1713 appear in the Appendix hereto.

Federal Rule of Criminal Procedure 31(c) reads as follows:

> "Conviction of Less Offense. The Defendant may be found guilty of an offense necessarily included in the offense charged. . . ."

The main principles emerging from the cases decided under Federal Rule of Criminal Procedure 31(c) indicates that two requirements must exist in order for an offense to constitute a necessarily included offense. If either of these two requirements is not present, the claimed included offense cannot constitute a necessarily included offense under this Section of the Federal Rules.

The first requirement is that the offense which is claimed to be a lesser included offense must indeed be lesser than the charged offense. That is to say, elements of the included offense must be fewer in number than the elements of the greater charged offense or stated differently, the included offense must be less than the

charged offense in terms of its constituent elements. See, for example, *United States v. Martinez-Gonzales*, 89 F.Supp. 62 (D.C. Cal., 1950). It has also been held that under Rule 31(c) the included offense must be less than the charged greater offense in terms of the punishment attached to each offense, thus, because a so-called lesser offense involved greater minimum punishment than the so-called greater offense. The Court in *James v. United States*, 238 F.2d 681 (9 Cir., 1956), held that the lesser offense was not included in the greater offense within the meaning of Rule 31(c).

The second necessary element is that in order for a crime to be considered an offense included in another offense the two offenses must contain common elements or stated somewhat differently, that for an offense to be a necessarily included offense, the lesser included offense must be such that the greater offense cannot be committed without also committing the lesser. See, for example, *James v. United States, supra*, and *Olais-Castro v. United States*, 416 F.2d 1155 (9 Cir., 1969) and *United States v. Barbeau*, 92 F.Supp. 196 (D.C. Alaska, 1950) affirmed 193 F.2d 945 (9 Cir.) certiorari denied, 343 U.S. 968.

The omission of the element of "fraud" in 18 U.S.C. §1713, as is found in 18 U.S.C. §500, denotes a lower level of culpability than in the latter statute. Since the elements of the misdemeanor defined by 18 U.S.C. §1713 are otherwise the same as the elements of the felony defined by 18 U.S.C. §500, Section 1713 is a lesser included offense under Section 500.

The Petitioner was therefore entitled to have the jury so instructed and the trial court's refusal to give such an instruction, it is submitted, was error. A lesser

included offense is made out where some, but not all, of the elements of the offense charged themselves constitute a lesser offense, provided, however, (as was in the instant case) that the jury must have been able to find a disputed element required for the greater offense which is different from or not included in the lesser offense. The introduction of any evidence tending to prove the disputed element requires the giving of the lesser included offense instruction. *Stevenson v. United States*, 162 U.S. 313, 314 (1896). *Berra v. United States*, 351 U.S. 131, 134 (1956). *Sansone v. United States*, 380 U.S. 343, 349 (1965). In order for a charge as to a lesser included offense to be required, the lesser included offense must be comprised solely of some but not all of the elements of the offense charged, and there must be a genuine conflict of evidence as to an element of the offense charged, an element not shared by the lesser included offense. *Government of the Virgin Islands v. Carmona*, 422 F.2d 95 (3 Cir., 1970) and *Sansone v. United States, supra*, at 349, 350.

In the instant case the only difference between the elements of these two offenses is that 18 U.S.C. §500 is more stringent in that it imposes a requirement of fraud on the part of the individual issuing the postal money orders. The Petitioner in this case testified that he did not have any intent to defraud when he issued these money orders. He testified that he felt that if he issued the postal money order on one date and was going to be audited at a later date he could pay back the money due on these postal money orders at that latter date. This was an issue to be decided by the jury, the finders of fact.

Respondent, the United States of America, contended at the Trial Court that 18 U.S.C. §1713 does not apply to this situation because the Petitioner was not an officer or employee of the Postal Service. Petitioner submits that he is an officer of the Postal Service. An officer is distinguished from an employee by the greater importance and independence of his position. An officer must give an oath and a bond and more enduring tenure and usually his duties are prescribed by law. In this case evidence was presented that the Petitioner did in fact have to put up a bond, did in fact have to take an oath of office, and was independent in his running of this postal contract station. The mere fact that the Petitioner was given postal money orders, stamps and other supplies necessary to run a postal contract station and was allowed to run this station without any direct daily control by the Postal Service, indicates that he must have been either an officer or employee of the Postal Service and so fit within the definition of the statute. *United States v. Pettee*, 273 F.Supp. 1011 (D.C. Mass., 1967).

II.

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE EMBEZZLEMENT COUNT SINCE A SPECIFIC STATUTE, WITH LESSER PENALTY, WAS ENACTED TO PRECLUDE THE GENERAL STATUTE, WITH GREATER PENALTY, UNDER WHICH THE PETITIONER WAS PROSECUTED.

The Government elected to prosecute the Petitioner under 18 U.S.C. 641. The text of which appears in the Appendix hereto.

It is submitted that the specific statute which would have fit the situation is Title 18 U.S.C. 500. The specific statute speaks in terms of penalty of $5,000 or 5 years, or both, as compared to the $10,000 or 10-year sentence of the general statute.

The legislative history of 18 U.S.C. 500 dictates that the terms of said Section supersede and replace in instances of this nature prosecutions pursuant to 18 U.S.C. 641. See *Public Law*, 92-430, entitled "Postal Money Orders."

The very situation with which the Trial Court was faced in the instant case was discussed in the legislative history and resolved in terms favorable to the Petitioner herein.

In addition, the act of taking the blank money orders is clearly met by the legislation in 18 U.S.C. 500 which resolves that a value need not be placed on the blank money order in order for embezzlement to exist. C.f., *Charter v. United States*, 387 F.2d 825 (8 Cir., 1968). In the instant case Mr. DE VESTE converted blank

money orders. The Government failed to place a market value on the same. Technically, with the prosecution being rested upon 18 U.S.C. 641, all Mr. DE VESTE would be liable for would be a misdemeanor. Prosecution under 18 U.S.C. 500 would result in a felony conviction, regardless of whether value had been proved or not.

The United States Court of Appeals for the Ninth Circuit did not reach this question in its affirmance of Petitioner's conviction, based on the concurrent sentence rule. This Court, in footnote 1 to its opinion in *United States v. Maze*, _____ U.S. _____, 94 S.Ct. 645 (1974), stated:

> "The Court of Appeals determined that even though it affirmed respondent's Dyer Act conviction, for which he had received a concurrent five-year sentence, it should also consider the mail fraud convictions as well. There is no jurisdictional barrier to such a decision, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), and the court decided that 'no considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony.' 468 F.2d at 536 n. 6. We agree that resolution of the mail fraud questions presented by this case is appropriate."

Petitioner submits that a resolution of this question is appropriate under this decision.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted:

OSCAR B. GOODMAN, ESQ.

By /s/ Oscar B. Goodman
OSCAR B. GOODMAN
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAILING

The undersigned, Secretary to OSCAR B. GOODMAN, ESQ., hereby certifies that three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari was, on the 8th day of October, 1974, mailed, postage prepaid, to the Honorable ROBERT BORK, Solicitor General, United States Department of Justice, Washington, D. C. 20530.

/s/ Linda C. Rogers
LINDA C. ROGERS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
SEP. 11, 1974
CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	No. 74-1107
JOHN DE VESTE, *Defendant-Appellant.*	)	*MEMORANDUM*

On Appeal from the United States District Court for the District of Nevada

Before: MERRILL and ELY, Circuit Judges, and REAL, District Judge

Defendant appeals from a conviction by a jury of three counts of violating 18 U.S.C. § 500,[1] by issuing money orders without having previously received

*Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

payment, with intent to defraud the United States, and one count of embezzlement.

Defendant operated a contract station of the United States Postal Service in Las Vegas, Nevada. He issued postal money orders without having received or paid the full amount of money payable. On trial defendant did not contest the fact that he had issued the money orders without first receiving payment. However, he contended that he had not done so fraudulently since he always had intended to make good the shortage and believed that he would be able to do so at the time of the audit.

Appellant does not pursue this defense on appeal. Here he contends that the district court erred in refusing to instruct the jury that they could convict of the lesser included offense of issuing a money order without having received prior payment under 18 U.S.C. §1713. That section, however, could not apply to appellant and is not, as to §500, a lesser included offense. It requires that the offender be an "officer or employee" of the postal service. Appellant was an independent contractor operating a contract station. The agreement under which he was operating expressly provides: "Neither the contractor nor any person employed by him to assist in the conduct of the contract station or branch is an employee of the Federal Government for any purpose whatsoever." The fact that appellant was required to take an oath "of office" and place a bond does not constitute him an officer. The United States can, if it chooses, impose such restrictions upon those with whom it contracts.

Appellant also contends that the district court erred in failing to dismiss the embezzlement count on the

ground that a more specific statute (§500) covered the offense. Under the concurrent sentence rule we need not reach this contention. It does not affect the validity of the conviction upon the three other counts.

Judgment affirmed.

FOOTNOTES

[1] Section 500 reads in pertinent part:

"Whoever issues any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any officer, employee, or agent thereof, any sum of money whatever;* * *

* * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

APPENDIX B

Judgment and Commitment (Rev. 2-68) Cr. Form No. 25

ENTERED
DEC 20 1973

CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA
By JANET MCCORMICK DEPUTY JANET MCCORMICK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEVADA

United States of America	)	
v.	)	Criminal-LV 2755
	)	
	)	
JOHN DeVESTE	)	

On this 21st day of December, 1973 came the attorney for the government and the defendant appeared in person and[1] with counsel, Oscar B. Goodman.

It Is Adjudged that the defendant upon his plea of[2] not guilty and a verdict of guilty has been convicted of the offense of fraudulent issuing of postal money orders, in violation of Title 18, Section 500 of the United States Code; and embezzlement, in violation of Title 18, Section 641 of the United States Code,

as charged[3] in counts 1, 15, 20 & 21 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: *AS TO COUNT 1*, FIVE (5) YEARS; and on condition that the defendant be confined in a jail type or treatment institution for a period of NINETY (90) DAYS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for such remainder, upon the following terms and conditions: 1) That he obey all local, state and federal laws. 2) That he comply with the rules and regulations of the probation department. 3) That he make full restitution to the United States Postal Service within the period of probation in such installments as the probation officer shall direct.

AS TO COUNTS 15, 20 AND 21, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS; and on condition that the defendant be confined in a jail type or treatment institution for a period of NINETY (90) DAYS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed

SEE REVERSE SIDE

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or

other qualified officer and that the copy serve as the commitment of the defendant.

/s/ (illegible)
(illegible)
United States District Judge.

JOHN A. PORTER, CLERK
By: /s/ P. Bluiett, Jr.
P. Bluiett, Jr.
Deputy Clerk.

---

[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel," [2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and if consecutively, when each term is to begin with reference to termination of proceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court to recommend a particular institution.

on probation for such remainder, upon the following terms and conditions 1) That he obey all local, state and federal laws. 2) That he comply with the rules and regulations of the probation department.

IT IS ADJUDGED that the sentences imposed as to counts 15, 20 and 21 are to run concurrently with each other and concurrently with the sentence imposed as to count 1.

IT IS ORDERED that the execution of the sentence imposed is hereby stayed until 10 o'clock a.m. on Monday, January 7, 1974, at which time the defendant shall surrender himself to the United States Marshal at Las Vegas, Nevada.

Dated the 21st day of December, 1973.

/s/ (illegible)
(illegible)
United States District Judge

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on to
Defendant noted appeal on
Defendant released on
Defendant elected, on not to commence service of the sentence.
Defendant's appeal determined on
Defendant delivered on to
at , the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

United States Marshal

APPENDIX C

Ch. 25 COUNTERFEITING AND FORGERY 18 § 500

§ 500. MONEY ORDERS

Whoever, with intent to defraud, falsely makes, forges, counterfeits, engraves, or prints any order in imitation of or purporting to be a blank money order or a money order issued by or under the direction of the Post Office Department or Postal Service; or

Whoever forges or counterfeits the signature or initials of any person authorized to issue money orders upon or to any money order, postal note, or blank therefor provided or issued by or under the direction of the Post Office Department or Postal Service, or post office department or corporation of any foreign country, and payable in the United States, or any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereof; or

Whoever falsely alters, in any material respect, any such money order or postal note; or

Whoever, with intent to defraud, passes, utters or publishes or attempts to pass, utter or publish any such forged or altered money order or postal note, knowing any material initials, signature, stamp impression or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or

Whoever issues any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly,

to obtain or receive from the United States or Postal Service, or any officer, employee, or agent thereof, any sum of money whatever; or

Whoever embezzles, steals, or knowingly converts to his own use or to the use of another, or without authority converts or disposes of any blank money order form provided by or under the authority of the Post Office Department or Postal Service; or

Whoever receives or possesses any such money order form with the intent to convert it to his own use or gain or use or gain of another knowing it to have been embezzled, stolen or converted; or

Whoever, with intent to defraud the United States, the Postal Service, or any person, transmits, presents, or causes to be transmitted or presented, any money order or postal note knowing the same-

(1) to contain any forged or counterfeited signature, initials, or any stamped impression, or

(2) to contain any material alteration therein unlawfully made, or

(3) to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, or

(4) to have been stamped without lawful authority; or

Whoever steals, or with intent to defraud or without being lawfully authorized by the Post Office Department or Postal Services, receives, possesses, disposes of or attempts to dispose of any postal money order machine or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms-

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, §6(j)(5), 84 Stat.777; Sept. 23, 1972, Pub.L. 92-430, 86 Stat.722.

Ch. 31 EMBEZZLEMENT AND THEFT 18 § 641

§ 641. PUBLIC MONEY, PROPERTY OR RECORDS

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted-

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Ch. 83 POSTAL SERVICE 18 § 1713

§1713. ISSUANCE OF MONEY ORDERS WITHOUT PAYMENT

Whoever, being an officer or employee of the Postal Service, issues a money order without having previously received the money therefor, shall be fined not more than $500. As amended Aug. 12, 1970, Pub.L. 91-375, §6(j) (23), 84 Stat. 779.